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CHARLES ELMORE
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No. 469

IN THE

Supreme Court of the United States

TEXAS AND NEW ORLEANS RAILROAD COMPANY ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS ET AL., *Respondents.*

PETITION OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, H. M. LULL, G. S. WAID AND JOHN G. TORIAN, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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J. H. TALLICHET,
Attorneys for Petitioners.

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To the Honorable, The Supreme Court of the United States:

Now come Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and John G. Torian, against whom the interlocutory and final judgments of the District Court of the United States for the Southern District of Texas, Houston Division, as well as the judgment of the United States Circuit Court, af-

firming the interlocutory and final judgments first mentioned, were rendered in this cause and petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit sitting at New Orleans, Louisiana, to review the decision of said court in this cause, and represent and show to the court:

I.

Texas and New Orleans Railroad Company is a corporation created under and by virtue of the laws of the State of Texas, and H. M. Lull, G. S. Waid and John G. Torian are officers of said company. Each and all said parties, hereinafter styled petitioner, are citizens of Houston, Harris County, Texas, in the Southern District of said State, and are there domiciled.

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Southern Pacific Lines in Texas and Louisiana, is a voluntary association, having membership in the States of Louisiana and Texas and in the Southern District of Texas; H. W. Harper, A. R. Campbell and B. G. Hudson are citizens of Houston, Harris County, Texas, in the Southern District of said State, and are there domiciled, R. E. Stotzer is a citizen of Seguin, Guadalupe County, Texas, in the Western District of said State, and is there domiciled, and John C. Moulin is a citizen of Louisiana, resides in the Western District of said State, and is there domiciled.

Each and all said parties are hereinafter styled respondents.

Counsel for respondents are Donald R. Richberg, Esq., of Chicago, Illinois, and John H. Crooker, Esq., and Carl G. Stearns, Esq., of Houston, Texas.

Summary and Short Statement of the Matters Involved.

(1) *Brief Statement of Issues Involved:*

The District Court of the United States for the Southern District of Texas held in this cause that the Third Paragraph of Section 2 of the Railway Labor Act of May 20, 1926 (44 Stat. L., 577): "Representatives, for the purpose of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other," forbade officers and agents of petitioner, Texas and New Orleans Railroad Company, to recommend to its clerical employes membership in a local association of employes in preference to the respondent Brotherhood, or to inform said clerical employes that concessions could probably be obtained from the employer through the local organization which could not be obtained through the Brotherhood, and that such persuasion and advice should be enjoined and thereupon did enjoin the same, notwithstanding the opinions of this court in *Pennsylvania Railroad Company v.*

Labor Board, 261 U. S. 72, and *Pennsylvania Railroad Federation No.* 90 v. *Pennsylvania R. R. Co.,* 267 U. S. 203, dealing with a substantially identical statute.

The court held that said statute prevented either party, employer or employe, from so influencing or attempting to influence the other in the selection of representatives or in organizing, and that in so doing it is not unconstitutional and does not take away inherent or inalienable rights, and enjoined petitioners accordingly, notwithstanding the decisions of this court in *Adair v. United States,* 208 U. S. 161, and *Coppage v. Kansas,* 236 U. S. 1, and notwithstanding the *First and Fifth Amendments to the Constitution of the United States.*

The court held that the granting of such injunction is not forbidden by Section 52 of Title 29 of the United States Code, which is Section 20 of the Clayton Act, the essential portions of said statute being: "No restraining order or injunction shall be granted by any court of the United States or a judge thereof in any case between an employer and an employe * * * growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property or to a property right * * * . And no such restraining order or injunction shall prohibit any person or persons * * * from terminating any relation of employment * * *," (U. S. Code Title 29, Sec. 52), and enjoined petitioners accordingly, notwithstanding the "dispute" here involved is clearly within the class included in

the statute and notwithstanding under the authority of the decision of the United States Circuit Court of Appeals for the First Circuit in *Foss v. Portland Terminal Co.*, 287 Fed. 33, no injury to property or to a property right appeared.

The court held that recognition by petitioners of the local association as the representative of the clerks employed by the railroad company upon a showing made by said association that it was authorized to represent a majority of such clerks, making public the fact of such recognition, and negotiating and agreeing with said local association with respect to increases in rates of pay, constituted interference, influence or coercion of the clerks within the meaning of the Railway Labor Act, was a violation of the injunction against such interference, influence and coercion, and was a contempt of the court which could be purged only by disestablishing the association and re-establishing the Brotherhood, respondent herein, as the representative of the said clerical employes, and required petitioners to so disestablish the association and re-establish the Brotherhood under pain of imprisonment of the individual petitioners until this should be done.

The court held that action of the petitioners in permitting officers and representatives of the association to organize, promote, manage and attend to the business of the association on the railroad company's time and without deduction for time lost or expense incurred constituted interference, influence or coercion

forbidden by the statute, was a violation of the injunction, and a contempt of the court, and it enjoined any and all such action unless a similar privilege should be accorded to the officers and representatives of the Brotherhood.

The court held that the petitioners, in dropping two of the officers of the Brotherhood from the seniority rosters of the railroad company, on which they had been carried for a long time without rendering any service to the railroad company, and in ceasing to furnish them with free passes, insurance and hospital benefits customarily furnished only to employes, were guilty of interference, influence and coercion within the meaning of said statute; that said action was in violation of the injunction, and a contempt of the court, and it required that said so-called employes be restored to the seniority rosters and be furnished by petitioners with free passes, insurance, and hospital benefits in like manner as if they were actual employes, under pain of imprisonment of the individual petitioners until this should be done.

The court held that the discharge by the railroad company, acting through other officers than those who are petitioners herein, of three clerical employes who were members of the Brotherhood and two of whom had made affidavits used by respondents in this litigation, for causes wholly unconnected with the suit or any matter involved in it, and adequate in the opinion of the employing officers, was interference, influence or coercion within the meaning of the statute, was a

violation of the injunction, and a contempt of the court, and required petitioners to restore said clerical employes to the service without prejudice or loss of seniority rights, and to make them whole for any loss of pay they might have sustained by reason of their discharge, under penalty of imprisonment as before dated.

The court required petitioners to pay to the attorneys for the complainants, respondents herein, a fee for services and expenses in connection with the contempt proceeding herein notwithstanding said fee was in fact for procuring an extension and enlargement of the original injunction embodied in the contempt orders and not for service in any proceeding for actual contempt, under penalty of imprisonment as before stated.

The court has so framed and interpreted the temporary injunction, and so framed the final decree as to keep the petitioners in constant jeopardy of contempt, without being able to determine what action, however lawful in itself, they may take in the management and operation of an important instrumentality of interstate commerce, which they are bound by law to operate efficiently and economically, will be a violation of the injunction, which therefore can only operate as a snare to the petitioners.

Petitioners respectfully contend that each and all of the foregoing holdings and actions of the District Court are erroneous.

The Circuit Court of Appeals affirmed the judgment

aforesaid, with, however, a dissenting opinion, without any review of the disputed facts, and this in a case where constitutional rights, based on such facts, are involved. *Ohio Valley Water Co. v. Ben Avon,* 253 U. S. 287.

Petitioners respectfully contend that the ruling and holding of said Circuit Court of Appeals, in affirming the judgment of the District Court without consideration by it of the disputed facts, is erroneous.

(2) *Statement of the Pleadings:*

The Brotherhood of Railway Clerks, and H. W. Harper, its General Chairman, filed their bill July 25, 1927, against petitioners' railroad company, its officers and agents, and certain of its clerical employes, officers and members of the local association hereinbefore referred to, alleging that the Brotherhood was organized about September, 1918, and had acted as representative of certain clerical employes of the Southern Pacific Lines in negotiations with the company. That in November, 1923, the company and this Brotherhood made a written agreement covering rates of pay and working conditions. That in November, 1925, it had applied for a further increase in wages, which was refused by the company and an appeal taken by the Brotherhood to the United States Railway Labor Board. This appeal was pending when the Railway Labor Act of 1926 took effect, was remanded to the parties, and thereafter came before the Board of Mediation created by this last statute. The bill then

details the proceedings had before this Board of Mediation which extended through 1926 into 1927 and avers in the fifth paragraph:

> "That about June, 1927, the defendant Texas & New Orleans Railway Company and its officers (naming them) unlawfully conspired together with the other defendants and undertook, instigated and encouraged the formation of a so-called 'company' union of railway clerks in defendant's employ for the express purpose of interfering with, influencing and coercing the plaintiff railway clerks concerning the formation and maintenance of labor organizations among themselves and the designation by said railway clerks of a representative or representatives to represent and act for them in this the pending controversy before the United States Board of Mediation." (R. pp. 27 and 28.)

The Acts alleged to have been done in pursuance and furtherance of this charged conspiracy are in substance that the defendants caused a petition, addressed to the railway management, to be presented to all or a large majority of the clerks for signature, in which the clerks requested permission to take steps necessary to the formation of this association to act for them instead of the Brotherhood. That in order to procure signatures to this petition the defendants, Ehlinger, McDaniel and others, who were clerks interested in the organization of the association, and certain agents (three in number) of the company solicited members of the Brotherhood for signatures and told them that the railway company would not grant any

increase in rates through the Brotherhood, that their association with the Brotherhood would do them no good, that the officers of plaintiff Brotherhood were only feathering their own nest. These parties are also alleged to have stated that if the clerks joined the association and the association was selected to act for the employes, the Southern Pacific Lines would grant increases to these employes aggregating about $75,000.00 a year. That various clerks were threatened by other clerks interested in the association, with loss of vacation and similar privileges if they did not sign, and at least one clerk who did not sign had been deprived of his pass privilege.

Upon these allegations, which are elaborated in much detail in the 5th to 8th paragraphs inclusive (Record, pages 33 to 43), a temporary injunction was sought to prevent the defendants from in any manner intimidating any of said employes with respect to their free right to select and designate representatives for the purpose of considering and contesting disputes under the Railway Labor Act; and to restrain the company from terminating the contract alleged to have been entered into between the Brotherhood and the company and for general relief.

Attached to this original bill were seventeen *ex parte* affidavits (Record pages 47 to 72), made by fourteen clerks, detailing conferences with them by members of the association and in some cases by said three agents, and arguments made to them to induce them to join the association.

The arguments disclosed by these affidavits are substantially the same in each instance and are in effect that the solicitor urged the affiant to join the association and stated that the Brotherhood could accomplish nothing, but that the association if authorized to act for the employes could get an increase in wages of approximately $75,000.00 which could not be had through the Brotherhood. Each affiant declares under his oath that he declined these blandishments and refused to join the association.

At the hearing of the application for a temporary injunction, which was immediate, petitioners filed *ex parte* affidavits (R. 413-439 and 453-458), the substance of which was that neither the railroad company nor its officers had caused the formation of the association—the so-called "company union," but that it had been formed by the clerks themselves; that it claimed to represent a majority of the clerks and had requested recognition, but that the railroad company had put it off with the statement that it would not consider its claim until the pending mediation proceedings with the Brotherhood should have been disposed of or dismissed; that there had been no interference, influence or coercion by the railroad company or its officers of the clerks, but that several officers and employes of the railroad company had and, until it should be declared unlawful for them to do so, intended to continue, by advice, reasonable argument and persuasion, to present to said employes the advantages, as they see it, of the

employes being, becoming or remaining members of the association rather than of the Brotherhood.

On October 22, 1927, complainants, the Brotherhood and H. W. Harper, filed an information charging petitioner railroad company and its officers, H. M. Lull, G. S. Waid and John G. Torian, with contempt of court, and procured a rule thereon to show cause why they should not be punished. (R. 91-161.) The following are the acts of alleged contempt charged in said information as in violation of the temporary injunction theretofore, on August 2, 1927, issued by the District Court:

(a) Publication of a letter, bearing date August 6, 1927, from J. G. Torian to F. C. Ehlinger, General Chairman of the association, recognizing the association as representative of the clerks, and Torian's further letter of August 9, 1927, to the various Division Superintendents, advising them of the fact of recognition. (R. 96-97.)

(b) Action of Torian on August 20, 1927, in granting, by agreement with the officers of the association, an advance in wages to all clerks which the association and the Brotherhood claimed to represent.

(c) Action on the part of H. M. Lull, Executive Vice-President, and of other officers of the Railroad Company, in declining to reverse the action of Torian in recognizing the association as representative of the clerks.

(d) That representatives of the Brotherhood, when absent from work for the purpose of demanding that

the Brotherhood be recognized in preference to the association, had deductions made from their pay for time so lost, while representatives of the association were exempted from similar deductions.

(e) That Harper and Walker, officials of the Brotherhood, were dropped from seniority rosters, their passes taken up, and certain insurance and hospital benefits terminated.

(f) By affidavits, filed during the course of the hearing, that three clerks, Stotzer, Hudson and Ginsburg, were discharged because they were members of the Brotherhood.

Petitioners' answer to this information alleged the following facts:

That the recognition of the association only came after it had exhibited authorizations signed by employes who were regarded as constituting a majority of the membership eligible to these orders. That the association had been formed and all but recognized when the injunction proceedings were instituted and when the court's temporary order was entered, and all that was done after these dates was to receive and check the list of employes who had signed these letters of authorization, found at pages 460 to 467 of the Record, ascertaining that they constituted a majority and according them the recognition that they were entitled to have.

That the making of the wage agreement which followed on the 20th of August was for the benefit of all

the employes, and was with the association, which had been duly recognized on August 6th.

That all the other matters complained of and charged to constitute a violation of the court's injunction were things that logically and naturally followed the recognition of the associations, or were within the rights of the company, or were untrue. For instance that neither Harper nor Walker were in fact entitled to remain on seniority rosters while performing no service for the railroad company, nor to receive free passes or other privileges, except while their organization was recognized as representing the clerks, and then only during the pleasure of the company, and that Stotzer, Hudson and Ginsberg were discharged for adequate cause in no wise connected with the Brotherhood, or its claims. (R. 171-185.)

On March 6, 1928, complainants amended their bill (Record pages 314 to 370), omitting all defendants except Texas and New Orleans Railroad Company, and all the individual defendants were thereupon dismissed from the proceeding, except the defendants Lull, Waid and Torian with respect to the contempt proceeding. On March 13, 1928, during the final hearing, A. R. Campbell, B. G. Hudson, R. E. Stotzer and John C. Moulin, clerks in the employ of the defendant company, filed a bill of intervention, adopting the allegations of the amended bill. (R. 383-384.) On March 30, 1928, the complainants, Brotherhood and Harper, filed an amendment to their first amended bill of complaint (R. 386-387), and on the same day said inter-

veners filed an amendment adopting the allegations thereof. (R. 385.) The amended pleadings of the complainants did not tender any additional issues.

Petitioners, defendants below, in due time filed motion to dissolve the temporary injunction (R. 272), original and amended motion to dismiss the complaint (R. 292), and original and amended answer (R. 301), the motions comprehending the points set up in this petition, and the answer denying in due form the material allegations of the bill, that is, that the association of Clerical Employes had been created, directly or indirectly, by petitioners or that it was anything except an organization formed in good faith by the employes themselves, and expressly denying any unlawful interference, influence or coercion of the self-organization or designation of representatives by the employes.

(3) *Trial of the Cause and Result Thereof:*

On hearing of the application for a temporary injunction the court entered an order enjoining and restraining the defendant railroad company, its officers and agents from interfering with, influencing or coercing the clerical employes in their right of self-organization and designation of representatives. (R. 94.) Injunction against the individual officers and members of the association of the Clerical Employes was denied. (R. 82-84.) No appeal was taken from this order and any and all activity on the part of officers and agents of the railroad company in the matters complained of in the bill and affidavits ceased.

On the hearing on the information alleging violation of the injunction for contempt of court it appeared that the Association of Clerical Employes had been fully organized and had elected officers and was requesting recognition prior to the institution of the suit. That prior to said time its officers had tendered written authorizations held by them from a large number of clerical employes, requesting that they be received and examined and that the association be recognized as representative of the clerks, but the railroad company had declined for the time being to entertain the request. That on August 5, 1927, the officers of the association again tendered the railroad company the authorizations held by it, which were received, counted and checked against the records of the company, with the result that approximately 82 were thrown out because signed by persons whom the officers of the railroad company did not consider clerks, and others were disregarded because of duplications. It was concluded that said authorizations were from a majority of the approximately 1,855 clerks recognized as eligible to membership in either the Brotherhood or the association.

That thereupon, on August 6, 1927, J. G. Torian, as assistant to the Vice-President and General Manager, addressed a letter to the General Chairman of the Association of Clerical Employes, advising him of the above result and that his committee would be recognized as representatives of the employes directly interested; that on August 9th the said Torian trans-

mitted a copy of this letter to the various Division Superintendents of the railroad company for the information of themselves and all others interested. That on August 20, 1927, as the result of conferences between officers of the railroad company and of the association ending on that day the railroad company granted to the clerks, whether members of the association or of the Brotherhood, or of neither, adjustments in pay constituting an increase in the compensation of the said clerks of approximately $100,000 per annum.

That thereafter officers of the railroad company declined to receive the officers of the Brotherhood as representatives of the clerks or to have dealings with them as such representatives. That two officers of the Brotherhood who had been carried on seniority rosters for long periods of time without rendering any service for the railroad were dropped from said rosters and their free passes over the lines of the railroad were called in, and they were denied certain other benefits, such as free insurance and hospital services customarily allowed employes.

That the officers of the Brotherhood, accompanied by three clerks actually in the service, called on the Executive Vice-President of the railroad company, demanding that the action theretofore taken be reversed, but their demand was denied and deduction was made for time lost from the pay of the three clerks who absented themselves from their ordinary duties for this purpose. That during the period of negotiation for recognition and for readjustment in pay no deductions

were made from the pay of representatives of the association and they were allowed their expenses while away from home for this purpose.

That on or about October 4, 1927, Charles Ginsburg, a clerk, who claimed to be a member of the Brotherhood, was discharged for insubordination, he having absented himself from duty in the face of instructions not to do so; that on or about October 27, 1927, B. G. Hudson, a clerk, whose affidavit was attached to the original bill, was discharged for attempting to obtain free transportation for his mother under the claim that she was wholly dependent on him, she being in fact not wholly dependent; and that on or about October 30, 1927, R. E. Stotzer, a clerk, whose affidavit was introduced in evidence in behalf of the Brotherhood in the hearing on the application for a temporary injunction, was discharged for errors in billing two carloads of perishable freight to the wrong destinations, resulting in payment of damage claims by the railroad company. Each of these parties admitted the existence of the facts for which he was discharged. Ginsburg and Hudson claimed that they had been told by other clerks that they would be discharged if they did not join the association. Stotzer insinuated that the making of the affidavit by him had something to do with the penalty imposed.

On February 6, 1928, the court entered an order finding petitioners, Texas and New Orleans Railroad Company, H. M. Lull, its Executive Vice-President, G. S. Waid, its Vice-President and General Manager, and

J. G. Torian, Assistant to the Vice-President and General Manager, guilty of contempt (R. 237-262), and pursuant thereto, on February 11, 1928, entered an order accordingly.

In said order it was decreed "that among other things done by said defendants were certain acts and conduct in violation of law and in disobedience of this court's restraining order, and that in order to purge themselves of said contempt said defendants, and each of them, must file in the office of the clerk a sworn statement within ten days from the date hereof, agreeing that they, and each of them, will do, perform and accomplish, or cause to be done, performed and accomplished, the following acts: * * *

"(1) Completely disestablish the Association of Clerical Employes as it is now constituted as the recognized representative of the Clerical employes of the Texas and New Orleans Railroad Company in the States of Texas and Louisiana.

"(2) Cease to permit officers and representatives of said association to organize, promote, manage, and attend to the business of said association, or any organization of said clerical employes hereafter formed, on the said Texas and New Orleans Railroad Company's time and pay, and at its expense and under the aegis of the authority of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, unless a similar privilege is accorded to the officers and representatives of complainant Brotherhood.

"(3) Reinstate and re-establish the said complainant Brotherhood as the representative of said

clerical employes in all matters relating to their employment, by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera*, substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without the dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another representative or representatives.

"(4) Restore H. W. Harper and John W. Walker to the service of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights.

"(5) Restore to said H. W. Harper and John W. Walker the pass privileges over the lines of Texas and New Orleans Railroad Company which they enjoyed prior to August 6, 1927.

"(6) Restore R. E. Stotzer, B. G. Hudson and Charles Ginsburg to the service as employes of the said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights, and make whole said Stotzer, Hudson and Ginsburg for any losses of pay they have sustained by reason of their discharge in violation of the temporary injunction herein, and in contempt of this court.

"(7) Pay all costs of court accrued in connection with this contempt proceeding, and further pay to Fulbright, Crooker & Freeman, as attorneys for the complainants herein, the sum of Two Thousand Dollars ($2,000), which is allowed to said complainants herein to cover reasonable and necessary attorney fees and expenses herein in connection with these contempt proceedings." (Record pp. 263 to 268.)

In default of compliance with said decree the individual defendants were ordered confined in jail until they should comply.

Within the time limited the order was complied with, petitioners each and all duly excepting to the order, but being unable to take an appeal until after trial on the merits and the entry of the final decree.

Upon the trial all of the affidavits and pleadings of both parties which had been used in the prior proceedings were introduced in evidence, additional affidavits and documents were introduced and oral testimony was taken. The facts proved were substantially those hereinbefore set forth and, in addition, that at said time the association had 894 members in good standing, while the Brotherhood had not more than 463, of whom only between 350 and 400 had their dues paid up. (R. 1026; 966-7.)

On the 19th of April, 1928, the court entered an order and rendered final judgment in substance sustaining all prior orders and decrees and perpetuating the temporary injunction.

In this order and final decree the court modified the third paragraph of the contempt order of February 11th with reference to a secret ballot by permitting the employes, by agreement among themselves, to adopt some other method of selecting representatives, and in all other particulars reaffirmed and continued in full force the several provisions of the order of February 11th. (Record pp. 393 and 394.)

III.

Petitioners, in due course, were allowed an appeal from the judgments aforesaid and duly assigned errors (set out in Appendix "A") with prayer for reversal, comprehending the grounds of error which will be presented in this court and embracing the questions submitted in the courts below.

IV.

The cause was heard by the appellate court, the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, being Cause No. 5406, as docketed in that court, and on June 10, 1929, said appellate court entered its order and judgment, affirming the judgments and decree of the District Court, said action being by the majority of the said court, but with a dissenting opinion by Hon. Rufus Foster, Circuit Judge. That thereafter, in due time, petitioners filed in said United States Circuit Court of Appeals their motion for a rehearing, which motion was considered by the court and thereafter, on August 10, 1929, denied; and thereupon the judgment of affirmance in said cause became and was a final judgment.

V.

A certified copy of the entire record of the said cause, including the proceedings in said Circuit Court of Appeals, is herewith furnished as an exhibit to this petition in compliance with Rule 38 of this honorable court.

VI.

Petitioners are advised and believe, and, accordingly, submit that said judgment of the United States Circuit Court of Appeals in said cause is erroneous and that this honorable court should require said cause to be certified to it for its review and determination in conformity with the provisions of Section 240 of the Judicial Code, as amended.

Petitioners maintain, as they submit will become apparent from what follows, that this cause involves questions of law of gravity and of importance, involving the construction of the Constitution and Laws of the United States; that the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on substantially the same matter; that it has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; that it has decided the Federal questions herein presented in a way probably in conflict with applicable decisions of this court; and that it has so far departed from the accepted and usual course of judicial proceedings and so far sanctions such departure by the lower court as to call for the exercise of this court's power of supervision; in that said Circuit Court of Appeals for the Fifth Circuit, by affirming said judgments and decree of the District Court over the grounds of error assigned by petitioner, committed erors which petitioner now here assigns in this court as follows:

(1) The court erred in affirming the judgments and decree against petitioners herein because all questions of law in this case have been decided adversely to the complainants below and respondents herein by this court in the *Pennsylvania Railroad Cases,* 261 U. S. 72 and 267 U. S. 203, and on the authority of these cases the bill should have been dismissed. (This point is germane to the following assignments of error in the court below: 1, 15, 16, 20, 21, 22, 34, 36, 43, 44, 53, 54, 55, 56, 57, 62 and 63.)

(2) The court erred in affirming the judgments and decree against petitioners herein because the third paragraph of Section 2 of the Railway Labor Act of 1926 confers at most only an abstract right upon the parties referred to therein. Representatives, though chosen in conformity with said section of the statute, are given no power to accomplish anything. The statute as a whole negatives any intent to compel conferences and adjustments after representatives are chosen. A court of equity cannot be invoked to determine an abstract right, the enforcement of which could lead to no definite result. (This point is germane to the following assignments of error in the court below: 1, 15, 53, 54 and 63.)

(3) The court erred in affirming the judgments and decree against petitioners herein because the orders enjoining petitioners from influencing employes of the company in the selection of representatives and the orders entered in the contempt proceedings for alleged violation of the temporary injunction

are void and, insofar as the Railway Labor Act of 1926 authorizes such orders and decrees, it also is unconstitutional and void. (This point is germane to the following assignments of error in the court below: 1, 15, 18, 19, 20, 23, 24, 25, 26, 28, 57, 58 and 59.)

(4) The court erred in affirming the judgments and decree against petitioners herein because Section 52 of Title 29 of the United States Code, which was Section 20 of the Clayton Act, prohibits the granting of an injunction in this cause. (This point is germane to the following assignments of error in the court below: 1, 15, 23, 24, 25, 53, 54, 56, 57 and 63.)

(5) The court erred in affirming the judgments and decree against petitioners herein because the recognition of the association by petitioners and the doing of each and all the other things alleged as violative of the temporary injunction were legally justified and were not in violation of the temporary injunction, even though it be conceded that said temporary injunction was lawfully granted. (This point is germane to the following assignments of error in the court below: 1, 16, 18, 19, 20, 23, 24, 25, 28, 29, 30, 31, 32 and 33.)

(6) The court erred in affirming the judgments and decree against petitioners herein because the several provisions of the contempt order of February 11, 1928, reaffirmed in the final decree of court, requiring petitioners to disestablish the Association of Clerical Employes as the recognized representative of the clerical employes of the railroad company; to cease to permit officers or representatives of said association to

organize, promote, manage and attend to the business of the association or any organization of said clerical employes thereafter formed on the railroad company's time and pay, or at its expense, or under its authority, unless a similar privilege is accorded to the officers and representatives of the Brotherhood; to restore and re-establish the Brotherhood as representative of the clerical employes; restore H. W. Harper and John W. Walker to the service of the railroad company without prejudice and without loss of seniority rights; to restore to said Harper and Walker pass privileges over the line of the railway company; and to restore R. E. Stotzer, B. G. Hudson and Charles Ginsburg to the service as employes of said railroad company without prejudice and without loss of seniority rights, and make them whole for any losses of pay they may have sustained by reason of their discharge, are unreasonable, arbitrary and oppressive, and are not justified by the pleadings and the evidence and should have been set aside. (This point is germane to the following assignments of error in the court below: 18, 19, 20, 23, 24, 25, 26 and 29.)

(7) The court erred in affirming the judgments and decree against petitioners herein because the order of the court bearing date July 29 and filed August 2, 1927, granting the preliminary injunction against interference, influence and coercion of the clerks does not by its terms or by any reasonable intendment prohibit the doing of the acts found by the trial court to have been in violation of said order. The contempt order

not prohibiting the things done, the punishment is *ex post facto*. (This point is germane to the following assignments of error in the court below: 1, 16, 19, 20, 23, 24, 25, 29, 30, 31, 32 and 33.)

(8) The court erred in affirming the judgments and decree against petitioners herein because the court below so framed and interpreted the temporary injunction and so framed the final decree as to keep the petitioners in constant jeopardy of contempt without being able to determine what action, however lawful in itself, they may take in the management and operation of the important instrumentality of interstate commerce, which they are bound by law to operate, without a violation of the injunction. (This point is germane to the following assignments of error in the court below: 16, 58 and 59.)

WHEREFORE your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and of all proceedings in said Circuit Court of Appeals in said cause, entitled "Texas and New Orleans Railroad Company et al., Appellants, v. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes Southern Pacific Lines in Texas and Louisiana et al., Appellees, No. 5406 on its docket, to the end that said cause may be reviewed and determined by this court

as provided by Section 240 of the Judicial Code, as amended, and that your petitioners may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of the Circuit Court of Appeals and every part thereof may be reversed by this honorable court and such relief granted as is appropriate to the cause.

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
H. M. LULL,
G. S. WAID,
JOHN G. TORIAN,

By H. M. GARWOOD,
J. H. TALLICHET,
Attorneys for Petitioners.

APPENDIX A.

Assignments of Error:

1. The court erred in overruling respondent's motion to dismiss and strike out the information alleging contempt filed herein because the same presents no cause of action or ground of complaint against them, or any of them, and wholly fails to allege any facts showing or tending to show that they, or any of them, have been guilty of contempt of court with respect to the temporary injunction entered herein. (Record page 1097.)

15. The court erred in holding respondents in contempt as set forth in the interlocutory decree of the court because the temporary injunction entered herein on August 3, 1927, is beyond the power of the court and void. (Record page 1099.)

16. The court erred in holding respondents in contempt because the said order and decree in general terms enjoined and restrained the respondents from interfering, influencing, intimidating or coercing their employes in the matter of selecting representatives and in the matter of the self-government of said clerks and no act or thing done by the respondents or either of them, since the making and entering of said temporary injunction and restraining order, was in violation of the terms of said decree, but each and all of the things done by the respondents, and which the court has now ordered the respondents to undo were none of them in violation of said injunction or restraining or-

der, but were all consistent with the observance thereof and were acts and things done within the rights of the respondents. (Record page 1100.)

18. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Completely disestablish the Association of Clerical Employes as it is now constituted as the recognized representative of the clerical employes of the Texas and New Orleans Railroad Company in the States of Texas and Louisiana";

because the court was without power to require the doing of this thing and the acts of the respondents in recognizing and dealing with the Clerks' Association was not a violation of the temporary injunction and restraining order heretofore issued in this case, but was the exercise of a valid legal right resting in respondents. (Record pp. 1100-1101.)

19. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Cease to permit officers and representatives of said association to organize, promote, manage and attend to the business of said association, or any organization of said clerical employes hereafter formed, on the said Texas and New Orleans Railroad Company's time and pay, and at its expense and under the aegis of the authority of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, unless a similar privilege is accorded to the officers and representatives of complainant Brotherhood";

because said acts were not in violation of said injunction but were done in the exercise of rights resting in the respondents, and the court was without power to require respondents to accord to the representatives of the Brotherhood the same treatment they might elect to accord to the representatives of the association. (Record page 1101.)

20. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Reinstate and re-establish the said complainant Brotherhood as the representative of said clerical employes in all matters relating to their employment by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera,* substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another representative or representatives";

because the acts done by the respondents were not in violation of the court's injunction, and because the respondents cannot lawfully be required to reinstate the Brotherhood as representative of its employes, the Railway Labor Act expressly conferring upon the railroad company as the employer, the power and right to deal with any employe or group of employes with reference to wages, conditions of service, etc., by con-

tract or otherwise, and it does not compel the respondents to enter into contracts or agreements, or even to recognize any particular representatives or groups of persons as authorized to act for or represent an entire class of employes contrary to the wishes of all or any part of said class of employes. (Record page 1102.)

21. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Reinstate and re-establish said complainant Brotherhood as the representative of said clerical employes in all matters relating to their employment by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera,* substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without the dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another representative or representatives";

because the court is without power by its order and decree through a contempt proceeding or otherwise to order and direct the respondents to recognize or deal with a particular group, through the Brotherhood or representatives of the Brotherhood, concerning wages or conditions of service, etc., for any particular or specified period of time, and no act of Congress nor any other law confers upon a majority of any class of employes the right to act for all of such employes of

such class, irrespective of the wishes of some of such class of employes who desire to be represented in some other manner. (Record pages 1102-1103.)

23. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt, to:

> "Restore H. W. Harper and John W. Walker to the service of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights";

because the court has not the power and authority through contempt proceedings or otherwise to compel the respondents to place H. W. Harper and John W. Walker on the roster of employes of the Texas and New Orleans Railroad Company, nor, as neither of them were in the service of said railroad company on June 1st, 1927, can the respondents be required to restore them to service. No contract relation of any kind existed between the respondents and said Harper and Walker and the most that can be said is that as a matter of grace, while the said Harper had been out of the respondent railroad company's employ for four years or more and the said Walker had been out of the employ of the respondent railroad company two years or more, their names had been permitted to remain on the roster of employes, yet, this created no contract right nor any other character of obligation enforcible through the courts in any character of proceeding to compel the continuation of their names on such roster or roll of employes. (Record pp. 1104-1105.)

24. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Restore to said H. W. Harper and John W. Walker the pass privileges over the lines of Texas and New Orleans Railroad Company which they enjoyed prior to August 6, 1927";

because the pass privileges heretofore enjoyed by the said Harper and the said Walker were gratuities and not based upon any contractual right or obligation, and the courts are without power, through contempt proceedings or otherwise, to require respondent railroad company to continue a gratuity or act of grace theretofore inuring to the benefit of said Harper and Walker; but the transportation of persons over respondents' lines of railway is a source of revenue for which it is entitled, under the law, to charge, and any order or decree of court, through a contempt proceeding or otherwise requiring said railroad company to extend free transportation privileges to one not entitled thereto as a matter of law or by contract right, is a deprivation of its property without due process of law, and violative of the rights of the respondent guaranteed to it under the Constitution and laws of the United States. (Record pp. 1105-1106.)

25. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Restore R. E. Stotzer, B. G. Hudson and Charles Ginsburg to the service as employes of

> said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights, and make whole said Stotzer, Hudson and Ginsburg, for any losses of pay they have sustained by reason of their discharge in violation of the temporary injunction herein, and in contempt of this court";

because there is no law which requires respondent railroad company to retain in its employ any particular person, and it has the inalienable right of selecting and retaining in its employ only such persons as it may choose to so select, employ and retain, and the respondent had the right to discharge said Stotzer, Hudson and Ginsburg for cause, or without cause so long as it violated no contract existing between it and them, and no such contract obligation is averred in the pleadings or found by the court to exist as a fact. The respondent cannot lawfully be compelled to restore to service, or to continue in its service, or to accept as an employe, any person contrary to its own wishes or inclination or contract rights, and in ordering Stotzer, Hudson and Ginsburg restored to service, and in ordering the respondent railroad company to make whole to them any losses of pay they had sustained, the court has exceeded its power and authority. The things required to be done by the respondents as set forth in said subdivision 6 of the court's decree of February 11th contravene the constitutional rights of said respondents and constitute a deprivation of their property and property rights without due process of law. (Record pages 1106-1107.)

28. The court erred in ordering, directing and requiring respondents not to recognize but to dis-establish the Association of Clerical Employes, because the respondents and representatives of said Association of Clerical Employes, heretofore entered into contracts and agreements relating to wages and conditions of service, each acting in good faith and not in intended violation, or violation, of this court's orders and decrees, but in the exercise of constitutional and statutory rights and powers, and such contracts and agreements cannot be destroyed by an order of this court without a hearing with all of the interested contractual parties before the court, nor without due process of the law of the land. (Record page 1108.)

29. The court erred in holding the respondents in contempt because of the discharge of Stotzer, Hudson and Ginsburg because the evidence in this case shows that each of said persons were discharged for cause, as the employer had a right to do, the facts, conditions and circumstances surrounding the discharge of each of said employes having been fully shown by such evidence, and further because the proof in this case shows affirmatively that neither of the defendants, Lull, Waid or Torian, had any part in the discharge of the said employes, it appearing from such evidence that their respective discharges were upon orders from the superintendents of their respective divisions without consultation, conference or reference to the said defendants, and, so far as this record discloses, without knowledge on the part of said defendants of any ac-

tivity on the part of said three employes in the Brotherhood of Clerks and because the evidence in this case shows that said employes were not discharged on account of their membership or interest in the Brotherhood of Clerks, nor because of any activity on their part in this controversy. (Record pages 1108-1109.)

30. The court erred in holding respondent Texas and New Orleans Railroad Company in contempt because such holding is not supported by, but is contrary to, the evidence.

31. The court erred in holding respondent H. M. Lull in contempt because such holding is not supported by, but is contrary to, the evidence. (Record page 1109.)

32. The court erred in holding respondent G. S. Waid in contempt because such holding is not supported by, but is contrary to, the evidence. Record page 1109.)

33. The court erred in holding respondent J. G. Torian in contempt because such holding is not supported by, but is contrary to, the evidence. (Record page 1109.)

53. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the

right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because there is no power conferred upon the court to grant such injunction by any statutory provision of the United States, nor do complainants bring themselves within any settled or customary rules of practice in courts of equity authorizing and empowering courts to grant such injunction. (R. 1118.)

54. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because neither the Railway Labor Act in itself nor any law enacted by Congress, nor any custom or recognized rules of equity courts contemplate or permit the issuance of injunctions in controversies between an employer such as the respondent railroad company is, and employes such as the complainants are. (R. 1118-19.)

55. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its

officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating, or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the Railway Labor Act, under the terms of which the court has apparently granted the injunction, is self-executing and self-operating, and under its terms and provisions it is manifest that the court has no power by injunction or by any other means to direct, command or interfere with the activities and negotiations of the employer on the one hand and the employes on the other, in the matters covered by said Railway Labor Act. (R. 1119.)

56. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because it is the manifest intention of the Congress of the United States, as evidenced by the Railway Labor Act and

the provisions of Section 52, Title 29, of the United States Code, to prevent and to prohibit the issuance of injunctions and other coercive orders and decrees in controversies and disputes between employes such as the complainants are and the employers such as the defendants are. (R. 1119-20.)

57. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of the railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the complainants' amended bill of complaint and the exhibits attached thereto and made a part thereof are insufficient as a matter of law to invoke the equitable powers and jurisdictions of this court, or to authorize this court to grant the equitable relief prayed for, and to issue its injunction as has been done in this case, it appearing therefrom that no property rights of the complainants are involved and no irreparable damage would be sustained by said complainants, if said injunction were denied. That as reflected by the complainants' bill of complaint, the controversy was one between two rival claimants for recognition by the railroad company to represent employes of the class

described in said amended bill of complaint, and that such recognition could confer no benefits or property rights on the complainants, it appearing from the terms of the Railway Labor Act itself that in each successive step to the adjustment board, to the mediation board and on to arbitration, depended upon the voluntary acts of the parties, and that no power, authority or right is conferred by said Act upon the representatives of any class of employes to compel the employer, the railroad company, to grant any demand or to make any kind of agreement, and as the recognition of any one group of persons over another group of persons could clothe them with no power or authority nor create any rights in them to compel the employer, railroad company, to any particular course of action, the designation or recognition of any such group, or the failure of the employer, railroad company, to recognize or designate any particular group as representatives of the class, could not in law affect any property right or inflict irreparable damage on injury upon the complainants. (R. 1120-21.)

58. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as

in said decree set forth, because the court is without power to grant an injunction in this cause, because the respondent, railroad company, and its executive officers have the inherent and constitutional right to converse and communicate with the employes of such railroad company and to express to such employes the wish of the employer, and to direct such employes as to the desires and purposes of such employer in the conduct of the employer's business in the line of such employes' relation to the employer. That any Act of Congress or order of court which prevents or tends to prevent the free exercise on the part of the employer of such rights, contravenes the inherent rights of the employer and the rights of such employer granted to it under the terms of the Constitution of the United States. That if the Act of Congress under which the court has acted, attempts or purports to confer any such power as the court has asserted, then it is an unconstitutional interference with the right of free speech, or free communication between employer and employe, and a deprivation of property and property rights without due process of law. (R. 1121-1122.)

59. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the

right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the respondent railroad company and its executive officers have the right to seek to influence their employes in all matters relating to their employment, their relations to the employer, their attitude towards the employer and the officers and agents of such employer, their attitude as well as their relations to organizations, unions and brotherhoods and as to any other matter or conduct which may tend to affect their loyalty, their efficiency or their capacity to properly discharge the duties of their employment. (R. 1122-23.)

63. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant, railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth because the court is without power to grant an injunction in this cause because the proof introduced does not establish a cause of action for the extraordinary relief sought by and granted the complainants herein, in that it appears therefrom that no statutory right or right created by law or by any rule of equity exists in the complainants, nor any statutory duty, nor any duty imposed by law or by

equity upon the respondents has been violated, or is threatened with violation. (Record page 1125.)

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 469

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *et al.*,
Petitioners,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ETC., *et al.*,
Respondents.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

H. M. GARWOOD,
J. H. TALLICHET,
Solicitors for Petitioners.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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[NOTE: The opinion of the court below on the granting of the temporary injunction (not reported) is at Record pages 76-81.

The other opinions are reported as follows:

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Perpetuating injunction: 25 Fed. (2nd) 873.

Circuit Court of Appeals: 33 Fed. (2nd) 13.]

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. .....

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *et al.*,
Petitioners,

vs.

BROTHERHOOD OF RAILWAY *and* STEAMSHIP CLERKS, *etc., et al.*,
Respondents.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinions of the District Court in this cause are reported:

Brotherhood of Railway Clerks, et al. v. *Texas and New Orleans Railroad Company, et al.*, 24 Fed. (2nd) 426; 25 Fed. (2nd) 873; and 25 Fed. (2nd) 876.

The opinion of the Circuit Court of Appeals in the cause is reported:

Texas and New Orleans Railroad Company, et al. v. *Brotherhood of Railway Clerks, et al.*, 33 Fed. (2nd) 13.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit rendered June 10, 1929 (R.1147), which became a final judgment by the overruling of petitioners' motion for a rehearing (R.1149), on August 10, 1929. (R.1165 .) The judgment of the Circuit Court of Appeals affirmed the following judgments of the District Court for the Southern District of Texas, Houston Division:

Interlocutory judgment entered February 11, 1928, decreeing that petitioners had violated a temporary injunction theretofore entered by the Court in this cause and prescribing the terms upon which the contempt of the Court so decreed might be purged, the individual petitioners to be imprisoned until said terms were complied with (R. 265-8); judgment entered April 19, 1928 overruling petitioners' motion to dissolve the temporary injunction, and to dissolve and to modify the contempt order (R. 293), and final judgment entered on the same day making the temporary injunction and the contempt order (with a slight modification) perpetual. (R. 294.)

The specific claims made by petitioners in the Court below were:

(1) Mere suggestion or advice by certain officers and agents of the Railroad Company to certain clerks, that it was to the interest of the clerks that they select as their representative or become members of a local rather than a National labor organization, is not unlawful nor in violation of the third paragraph of Section 2 of the Railway Labor Act 1926, which provides that representatives for the

purposes of the act shall be designated by each party without interference, influence or coercion by the other.

(2) All questions of law in the cause have been decided adversely to complaints below (respondents here) by this Court in the *Pennsylvania Railroad cases,* 261 U. S. 72, and 267 U. S. 203, and on the authority of these cases the bill should be dismissed.

(3) The third paragraph of Section 2 of the Railway Labor Act of 1926 confers at most an abstract right on the parties, employer and employee, referred to therein; representatives chosen in conformity therewith are given no power to accomplish anything, and the statute as a whole negatives any purpose to compel conferences and adjustments by representatives so chosen. A court of equity cannot be invoked to determine an abstract right, the enforcement of which can lead to no definite result, and accordingly the bill should be dismissed.

(4) The order enjoining petitioners from influencing employees of the Railroad Company in the selection of representatives and the orders entered in the contempt proceedings requiring the Railroad Company to disestablish the local organization, re-establish the National organization, and so forth, are void, and in so far as the Railway Labor Act of 1926 authorizes such orders and decrees it is unconstitutional and void, being in violation of the First and Fifth Amendments of the Constitution of the United States.

(5) Section 52 of Title 29 of the United States Code (which is Section 20 of the Clayton Anti-trust Act) prohibits an injunction in this cause, which is between employer and employee, growing out of a dispute concerning terms or conditions of employment, and not involving injury to property or to a property right.

(6) Recognition of the local organization as representative of the employer on its claim and showing that it was entitled thereto, refusal thereafter to recognize or deal with the National organization as such representative, granting favors to officers of the local organization which were denied officers of the other, dropping from senority rosters two officers of the National organization who had for a long time rendered no service to the Railroad Company but had been on leave of absence from its service devoting their entire time to the business of their organization, thereafter denying them free passes and other benefits as employees, and discharging three members of the National organization for admitted acts of negligence, of fraud and of insubordination were each and all legally justified, and the exercise of rights guaranteed under the Constitution of the United States. They were not acts of interference, influence or coercion in the right of organization or selection of representatives, in violation of the injunction, conceding, *arguendo*, that it was lawfully granted.

(7) The several provisions of the contempt order requiring petitioners, under pain of imprisonment until it should be done, to disestablish the local organization as

representative of the employees, re-establish the rival organization, withhold the favors above referred to from the officers of the local organization unless also granted the other, restore the officers of the National organization to the status of employees on leave of absence with free passes and all other privileges, and restore to the service the discharged employees, with pay for time lost are unreasonable, arbitrary and oppressive, and deprive petitioners of rights guaranteed them under the Constitution of the United States and the First and Fifth Amendments thereof.

(8) The order of the District Court, granting the temporary injunction against interference, influence and coercion does not prohibit the doing of the things above described, and held by said Court to be in violation of the injunction. The punishment is therefore *ex post facto*.

(9) The injunctions, temporary and perpetual, are framed in such vague and general language that, as interpreted and enforced by the District Court they keep petitioners in constant jeopardy of contempt, without any basis from which to determine what action in the management and operation of the railroad may be a violation of the injunction.

The District Court and the Circuit Court of Appeals overruled each and all said claims.

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code on the following grounds:

That the cause involves grave questions of vital importance to the public.

That the Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals on substantially the same matter, and has decided important questions of general law in a way probably untenable and in conflict with the weight of authority.

That said Court has decided an important question of Federal law which has not been but should be settled by this Court, to-wit,—the proper construction of the Railway Labor Act of 1926.

That it has decided Federal questions in a way probably in conflict with the applicable decisions of this Court.

That it has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the District Court, as to call for an exercise of this Court's power of supervision.

Statement of the Case:

This cause grows out of a dispute between two labor organizations, the "Brotherhood of Railway and Steamship Clerks, etc.," a so-called national or international organization, or a branch or department of it, hereinafter referred to as "Brotherhood", on the one hand, and the "Association of Clerical Employees of Southern Pacific Lines in Texas and Louisiana", an organization local to the lines of the Railroad Company, petitioner herein, hereinafter referred to as "Association", on the other, each organization claiming to represent a majority of the petitioners' clerical employees, and the right to speak for all. In May, June and July, 1927, both organizations were endeavoring to increase their membership, and to secure

authorizations to represent them from the clerical employees of the Railroad.

The Brotherhood had pending a dispute with the Railroad with respect to wages, and in July, 1927, a member of the Federal Board of Mediation was present, endeavoring to bring about a settlement. The Association urged that it was entitled to represent the clerks, being authorized to do so by a majority of them, but the Railroad declined to consider its claims until the efforts of the mediator were concluded. The mediator proposed, as his "final required action" under the statute, that the wage dispute be submitted to arbitration, but the Railroad declined, for the reason that it did not believe that the Brotherhood in fact represented the clerks. Thereupon on July 25, 1927, the mediator requested the representative of the Brotherhood (the respondent Harper) to exhibit to him his books and records in order that he might ascertain the number of its members. This was promised the mediator, but not furnished. (R. 851-2.)

Instead, and on said July 25, 1927, this suit was instituted by the Brotherhood and H. W. Harper against the Railroad Company, petitioner herein, and certain of its officers, agents and employees. It was alleged that the Brotherhood was the representative of the employee clerks by their own choice and by contract with the Railroad, that the latter and certain of its officers and employees had conspired to create the Association as pretended representatives of the employees, that they were in the manner above set forth interfering with, influencing and coercing the employees in their choice of representatives and in their

right of organization; and that the Railroad was about to breach the alleged contract with the Brotherhood. Prayer was for temporary and perpetual injunctions. (R. 6-72.)

Hearing of the application for temporary injunction was immediately had, at which the representations made to certain clerks and above referred to were proved and admitted, but the allegations with respect to the alleged contract and creation of the Association by or at the instigation of the Railroad were denied and disproved, and it was shown the Railroad had theretofore recognized and dealt with the Brotherhood only to the extent necessary to comply with rulings of the United States Railway Labor Board, created by the Transportation Act, 1920. (R. 413-419, 431-434.)

The District Court granted a temporary injunction (Opinion, R. 76-82) bearing date July 29th, and filed August 2, 1927, enjoining the Railroad, its officers, servants and agents from "in any way or manner interfering with, influencing, intimidating, or coercing plaintiffs or any of the approximately seventeen hundred clerical employees * * * with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding any and all disputes between said clerical employees and the defendant Railroad Company; and * * * from in any way or manner interfering with, influencing, intimidating, or coercing plaintiffs, or any of said clerical employees herein referred to of their free and untrammeled right of self-organization." (R. 82-84.)

Upon the announcement of this decision all representations to employees by officers and agents of the railroad, in the matter involved, forthwith ceased.

The offices of the mediator having terminated, the Association again urged its claim for recognition; its authorizations signed by employes were received, checked against the records of the Railroad, counted and (after more than eighty were thrown out because believed to be from employees not classed as clerks) found to be from a majority of the clerks. The Association was thereupon, on August 6, 1927, recognized as representative of the clerks, the fact of such recognition was announced to all concerned, and the Brotherhood and its officers were no longer recognized or dealt with as such representatives.

Officers of the Association then negotiated with officers of the Railroad for an adjustment in pay and on August 20, 1927, such adjustment was granted, amounting to an increase of approximately $100,000 per annum distributed among all the clerical employees.

Two officers of the Brotherhood, Harper and Walker, had rendered no service to the Railroad for a long period of time but had been on leave of absence devoting themselves entirely to the interests of the Brotherhood. While on leave of absence they had been allowed the privilege of free passes as constructive employes, together with other benefits, including free insurance and hospital service. Upon the recognition of the Association they were dropped from the seniority rosters and the privileges referred to were revoked.

Certain employees, members of the Brotherhood, called on an officer of the Railroad to demand that the action

theretofore taken be revoked and the Brotherhood again recognized, absenting themselves from their regular duties for this purpose; an appropriate deduction was made from their pay for time so lost from their ordinary duties, although during the period when representatives of the Association were negotiating for recognition and for adjustment in pay, no such deductions were made and they were allowed their ordinary living expenses while away from home for this purpose.

During the two or three months following the recognition of the Association, three clerks, members of the Brotherhood, were discharged, one for negligence, another for fraud and a third for insubordination, the discharge in each case being by officers immediately over the employe and the individual officers, petitioners herein, being without knowledge of and having nothing to do with the matter. The fact of the offense was in each case admitted by the man discharged, but two of them represented that prior to their discharge they had been told by fellow clerks that if they did not join the Association they would be relieved from the service and the third undertook to insinuate that his action in making an affidavit which had been used on the hearing of the application for a temporary injunction had something to do with his discharge.

On October 22, 1927, complainants, respondents herein, filed an information alleging that each and all the foregoing acts was done for the purpose of interfering with, influencing and coercing the clerical employees contrary to the terms of the temporary injunction (R. 91-164). On hearing, the facts above stated were proved and admitted, but it was denied and was not proved that said action was

taken otherwise than in good faith. The evidence did disclose, however, that at the time of the recognition of the Association sixteen of the clerks had executed retractions of their authorizations in favor of the Association, but the fact of such retraction was not made known to the Railroad until the time of the hearing.

The court on February 6, 1928, found petitioners each and all guilty of contempt because of the doing of the things above set forth and thereupon, on February 11, 1928, entered an order requiring the petitioners, on pain of imprisonment of the individuals until they were done, to begin within ten days and thereupon complete and accomplish the following acts:

> "(1) Completely disestablish the Association of Clerical Employees as it is now constituted as the recognized representative of the Clerical employees of the Texas and New Orleans Railroad Company in the States of Texas and Louisiana.
>
> "(2) Cease to permit officers and representatives of said Association to organize, promote, manage, and attend to the business of said Association, or any organization of said clerical employees hereafter formed, on the said Texas and New Orleans Railroad Company's time and pay, and at its expense and under the aegis of the authority of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, unless a similar privilege is accorded to the officers and representatives of complainant Brotherhood.
>
> "(3) Reinstate and re-establish the said complainant Brotherhood as the representative of said clerical employees in all matters relating to their employment,

by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera,* substantially as said status was on June 1, 1927, until such time as said clerical employees by a secret ballot taken in accordance with the further directions of this court, and without the dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another representative or representatives.

"(4) Restore H. W. Harper and John W. Walker to the service of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights.

"(5) Restore to said H. W. Harper and John W. Walker the pass privileges over the lines of Texas and New Orleans Railroad Company which they enjoyed prior to August 6, 1927.

"(6) Restore R. E. Stotzer, B. G. Hudson and Charles Ginsburg to the service as employees of the said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights, and make whole said Stotzer, Hudson and Ginsburg for any losses of pay they have sustained by reason of their discharge in violation of the temporary injunction herein, and in contempt of this court.

"(7) Pay all costs of court accrued in connection with this contempt proceeding, and further pay to * * * attorneys for the complainants herein, the sum of Two Thousand Dollars ($2,000). * * * (R. 266-268.)

Petitioners excepted to said order, but complied with its terms, pending hearing on the merits and appeal. (R. 271.)

Certain actual employes intervened in the cause, adopting the allegations of the bill (R. 381), an amended bill was filed (R. 314), which the interveners also adopted, original and amended motions to strike and to dismiss the bill, and answers traversing the material allegations of the bill were filed in due course (R. 301), all as stated in the petition for writ of certiorari. Motions to dissolve the temporary injunction and to modify and to dissolve the contempt order were also filed. (R. 272, 292.)

All said motions were heard and overruled. (R. 394.) On trial on the merits the evidence was substantially as above set forth, it further appearing that the Association had 894 members in good standing (R. 1026), and the Brotherhood not more than 463, of whom only 350 or 400 had their dues paid up. (R. 966-7.)

In the final decree the District Court made perpetual the temporary injunction, as well as the terms of the contempt order, the latter modified however by permitting the secret ballot provided for in paragraph 3 to be taken in accordance with the further directions of the court "or by any other means of selection which the employes themselves may decide upon or adopt." (R. 392.)

Petitioners duly excepted to all said rulings, and appealed to the Circuit Court of Appeals. That court in all things affirmed the judgments, holding that the contempt order "merely restored the *status quo*, without considering whether the court under the Constitution and law had the right to restore it, or to perpetuate it.

Specification of Assigned Errors Intended to be Urged:

The assigned errors intended to be urged are set out at length in Appendix A to the petition for writ of certiorari, and are summarized in said petition. As they are voluminous, petitioners beg the Court to permit their incorporation in this brief by reference to the petition, and to consider them as though at length set forth herein, their substance being as follows:

1. The court erred in granting the temporary injunction.

2. The court erred in holding the defendants, and each of them guilty of violating the injunction.

3. The court erred in imposing on defendants the requirements of paragraph 1 of the contempt order.

4. The court erred in imposing on defendants the requirements of paragraph 2 of the contempt order.

5. The court erred in imposing on defendants the requirements of paragraph 3 of the contempt order.

6. The court erred in imposing on defendants the requirements of paragraph 4 of the contempt order.

7. The court erred in imposing on defendants the requirements of paragraph 5 of the contempt order.

8. The court erred in imposing on defendants the requirements of paragraph 6 of the contempt order.

9. The court erred in overruling the motion to dissolve the contempt order.

10. The court erred in the final decree in making the temporary injunction perpetual.

11. The court erred in the final decree in making the terms of the contempt order, as modified by the court, a perpetual injunction.

12. The court erred in overruling the motion to dismiss the amended bill and in entertaining, and not dismissing the same.

Petitioners now seek a writ of certiorari to said Circuit Court of Appeals, petition for which is filed herewith. In support thereof they respectfully submit the following brief reference to the principles of law, to some of the decisions, and to the statutes which govern the matter.

ARGUMENT:

I.

Mere suggestion or advice by officers and agents of the Railroad to employees with respect to their organization, or selection of representatives is not unlawful, nor violative of the Railway Labor Act of 1926, nor subject to be enjoined. The decisions in this cause are contrary to the decisions of this Court in Adair vs. United States, 201 U. S. 161, and Coppage vs. Kansas, 236 U. S. 1, and violative of the First Amendment to the Constitution.

Fair examples of the influences sought to be exerted are contained in the following extracts from complainants' evidence:

> Witness and intervener Campbell: "On or about June 10th, 1927, during business hours, I was approached by Mr. C. E. Armstrong, assistant agent, who handed me a petition which I casually glanced at but did not read, and handed it back to him without comment, merely shaking my head as an indication that I would not sign. He then said: 'they tell me that they have $75,000 with which to give the clerks an increase in wages and they say that they are not going to give a cent through the Brotherhood of Railway Clerks'." (R. 49.)
>
> Witness Turk: "On or about June 5th, 1927, I was told that I was wanted in the Agent's office. I went into the office alone and there met Agent Gebhart and

Chief Clerk Ehlinger. Gebhart said: 'Turk, you remember in 1923, there was a movement to organize a Clerical Employes Association on these Lines. We are now trying to organize a similar organization and would like to know if you will sign up.' Mr. Ehlinger then made a statement with respect to the association. The conversation lasted perhaps twenty or twenty-five minutes, during which time Mr. Gebhart and Mr. Ehlinger discussed the matter with me frankly, to the end that they might induce me to sign the petition which they had presented to me." (R. 63-64.)

II.

The provisions of the Transportation Act, 1920, including the rules of the Labor Board which were construed by the Supreme Court of the United States in the Pennsylvania Railway cases are so nearly identical with the 1926 Statute that those cases are decisive of every question presented in the case at bar and under the authority of these decisions the complainants' bill should be dismissed.

In order to understand the extent to which these cases are applicable to the case at bar, it is necessary to make a comparative study of the Act of 1920 with the present statute. The purpose of both statutes was the *settlement of disputes* by *agreements* arrived at in *conference*. In the event the parties should fail to agree, then under the former statute the matter went to the Labor Board. Under the present statute, boards of adjustment were to be set

up by agreement, and for fear that they should fail, a board of mediation was provided, and if any controversy should not be settled by conference or by the adjustment board, or through the board of mediation, then an optional arbitration is provided. The machinery of the present statute is more complex than that of the old Act. But the preliminary steps looking to the selection of representatives, conferences and agreements, are substantially the same in both.

Act of 1920.

Sec. 301. "It shall be the duty of all carriers and their employees * * * to exert every effort to avoid interruptions growing out of disputes

Sec. 301. "All disputes shall be considered and if possible decided in conference between representatives designated and authorized to confer."

Rule 5 of the Labor Board:

"The right of an organization to act through representatives of *its own choice* shall be agreed to by the management."

Act of 1926.

Sec. 2. "It shall be the duty of all carriers to exert every reasonable effort to make and maintain agreements, etc., in order to avoid interruptions. * * *"

Sec. 2. "All disputes between a carrier and its employees shall be considered, and if possible decided with all expedition in conference between representatives designated and authorized to confer.

Sec. 2. (3d par.). "Representatives for the purposes of this Act shall be designated by the respective parties in such manner as may be provided in their corporate organization or unin-

Rule 15 of the Labor Board:

"The majority of any craft or class of employees shall have the right to determine what organization shall represent its members. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class."

(Act of 1920: U. S. Code, p. 1450, Sec. 132; c. 91, Sec. 301, 41 Stat. 469.)

corporated association, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other."

(Act of 1926: U. S. Code, p. 2105-6, Sec. 152; c. 347, Sec. 2, 44 Stat. 577.)

The above is a parallel of the preliminary provisions of both statutes, and we submit that their terms are identical.

Under Section 308 of the old statute the Board *"may make regulations necessary for the efficient execution of the functions vested in it by this title."*

Rules 5 and 15 were promulgated under this section. A rule promulgated by a statutory board with the express authority to make rules has the same force as if the rule were written in the statute. (See cases cited in the margin below.) The present act provides that the representatives for the purpose of the conference at which disputes are considered are to be chosen by each party without interference, influence or coercion by the other party.

The plaintiffs' bill in the *Pennsylvania* case, 267 U. S. 203, charged that the railroad company and its officers *had conspired* to defeat the statute and deprive plaintiffs of their statutory rights of proper representation, stating in much detail the wrongful acts complained of, and they are the same kind of acts which the complainant avers in the case before the court. They attacked the wage agreement made between the company and the company union, just as plaintiffs do in our case. The prayer of the bill in that case was for decree enjoining the defendant from enforcing the provisions of the wage agreement; from enforcing any change or rules as they existed under the old agreement; *from continuing to deal with the company union; from financing, interfering with, directing and controlling its employees and from refusing to confer and deal with the complainants' Federation No. 90,* which represents the great majority, etc.

The bill in our case after seventeen pages of historical statement in which the origin of the Brotherhood and its prior recognition by the company is averred, charges that the defendant and its officers (naming them) *unlawfully conspired* and undertook and instigated and encouraged the formation of the so-called company union for the purpose of interfering with the Brotherhood * * * in an effort

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Rules and Regulations promulgated by an administrative body created by Congress, to which body Congress has expressly given power to promulgate rules and regulations, have the force of law when such rules and regulations are not unreasonable or inconsistent with the statutory authority under which they purport to issue.

United States v. *Grimaud,* 220 U. S. 506; *United States* v. *Foster,* 233 U. S. 515; *Sawyer* v. *United States,* (C. C. A. 2, 1926) 10 Fed. 2, 416; *Peterson* v. *United States,* (C. C. A. 9) 1923 287 Fed. 17; *C. B. & Q. R'y* v. *Frye-Bruhn Co.,* (C. C. A. 8, 1911) 184 Fed. 15; *Tindle* v. *Hiner,* 17 Fed. 2, 522; *Fowler* v. *United States,* 11 Fed. 2, 895; *In Re Aliens,* 231 Fed. 335.

to supplant it as the accredited representative of the employees.

The prayer for relief in the bill before the court asks that defendants be enjoined from interfering with plaintiffs in the selection of representatives, *from recognizing the association, from permitting the company officials to aid in the organization of the association,* from withdrawing recognition from the Brotherhood, and from discharging Brotherhood men.

It will be seen that under statutes almost identical the plaintiffs in each case, upon similar averments, sought the same relief.

The holding in that case was in effect that though the statute *imposed* a duty to settle disputes by conferences between representatives designated to confer, yet—

> "The statute does not require the railway company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory co-operation, *and leaves it to the two sides to accept or reject the decision.* The statute provides the machinery for conferences, the hearings, the decision and the moral sanction. * * * *But there is nothing compulsory in the provisions of the statute as against either the company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law.* * * * (P. 215.)

"The so-called mandatory language of Section 301 might, *if that section were accompanied by a penalty for its violation or some other means of compulsion,* * * * be given the force of a statutory obligation of the parties to a dispute. * * * But when the statute is taken as a whole it may be searched in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated *were in any way to be forced into compliance* with the statute or with the judgments pronounced by the Labor Board. * * * It was not the intention of Congress to provide a remedy in court by injunction.

"*The ultimate decision* of the Board, it is conceded, is not compulsory, and no process is furnished to enforce it, *but it is urged that the preliminary steps are not the final decision,* and it will make the Act meaningless and wholly ineffective if under the Act the parties may not be forced to a conference and to a contest before the Labor Board. This very point was considered by us in the Labor Board Case, and we held that the questions how the representatives of each side should be selected and whom the Board should recognize as accredited representatives were of primary importance affecting the working conditions of the railroad. * * * *The same sanction, therefore, of publication and public opinion exists to protect these steps, and nothing more.* (P. 216.)

"Appellants charge that the company is attempting by threats to discharge its employees, to secure their consent to the agreement of July. All these things it might do and remain within its strict legal rights. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally action-

able. Therefore, the bill of complaint does not aver a conspiracy, and without that, equitable relief cannot be granted." (P. 217.) [Italics ours.]

Penna. R. R. Fed. No. 90 v. *Penna. R. R. Co.*, 267 U. S. 203.

See also: *Penna. R. R. Co.* v. *Labor Board*, 261 U. S. 72.

The history of the legislation as disclosed by the Congressional Records shows a constant disclaimer of any intention to *compel* the parties to observe any of the provisions of the bill. The Committee Reports disclose that the act was drawn by representatives of the carriers and of the labor organizations. It was stated at a committee hearing on January 15th that it was intended "as a method found by the parties themselves of adjusting labor disputes." (See Committee Report No. 1, p. 9.)

At page 11 of said report:

> "Arbitration is provided in the bill and all the machinery in respect to it is set out. That is not compulsory. The parties may arbitrate or they may not arbitrate. But the machinery of arbitration is set out, and the requirement is that if they do go into arbitration that ultimately the award of arbitration shall become the judgment of a court, the jurisdiction of which is set out in the bill, and shall be binding upon the parties." (R. 919-920.)

Here is the only place that a court is invited or expected to play any part. If the parties voluntarily arbitrate and have the award of the arbitrators made the judgment of

the court as provided in the Seventh Section, then and only them has the court any power to act.

Many pages of quotations similar to that just made are found in the Committee Reports that preceded the passage of this bill. (R. 918-962.)

III.

A court of equity cannot be invoked to determine an abstract right, the enforcement of which would lead to no definite result.

The aim and chief and only *purpose* of this Act was settlement of disputes by conferences, mediation and arbitration.

The third paragraph of Section 2 speaks of *"representatives for the purposes of this Act,"* and how they shall be chosen.

If Congress had gone further and made the chief aim of the statute compulsory then there might be an argument that a preliminary step leading to this chief aim was compulsory. But how can it be said that since the chief aim and obvious purpose is left without compulsion that one of the steps leading to this aim is compulsory, when after that compulsion has been exercised to enforce this detail the power of further enforcement to accomplish the ultimate purpose for which this detail was provided is withheld?

The government and public are not concerned with *who* shall act as representatives, but in *what* they shall do after

they are chosen. The public is not concerned in whether the Association or the Brotherhood is chosen to talk for the employees, but only in having whoever is chosen reach agreements which will keep the peace.

However, the construction given to the Act of 1920 might be ignored and the same results reached by the ordinary rules of statutory construction. We are here concerned with an Act of Congress containing many sections, and it is elementary that each section is to be read in connection with the rest of the Act, and interpreted with due regard to its manifest purpose (*Nashville R'y* v. *Tennessee,* 262 U. S. 318, 323), and any construction which would lead to a result at variance with the policy of the legislation as a whole will be avoided. *Ozawa* v. *United States,* 260 U. S. 178, 194.

The majority of this court suggested in *Wilson* v. *New* that Congress had power to compel arbitration. The very members who drew, debated and voted the present statute expressed themselves as believing that Congress had this power, but disclaimed any intention of using it in the statute. How, then, can it be said that if Congress deliberately withheld its power to enforce the chief and only purpose of the Act that it intended to put behind this preliminary step the power that it withheld for the enforcement of the ultimate purpose?

The ultimate purpose of the statute, that is, the conferences, settlements and agreements the parties are required to make, is stated in language just as mandatory as the words found in the third paragraph of Section 2 concerning the selection of representatives. But in the Penn-

sylvania case this court held that under the identical language found in the former statute the court could not compel the parties to *confer* or *agree;* that it could not compel the company to *recognize* or *deal* with the representatives chosen by Federation No. 90.

The jurisdiction of the court is invoked to protect the selection of representatives, a primary step toward the desired end, yet the court is wholly without power to compel this ultimate purpose, it being left entirely to the volition of the parties.

In *Goodrich* v. *Moore* (1858), 2 Minn. 49, language very apt to the present situation is found:

> "But courts of equity will not exercise their powers for the enforcement of a right or the prevention of a wrong, in the abstract, *and when no actual benefit is to be derived by the party who seeks to exercise such right.* * * *"

This Court has likewise called attention to this rule in *Foster* v. *Railroad* (1892), 146 U. S. 88, 101:

> "In a case of this kind, where the plaintiff seeks to annul a long standing decree, it is a circumstance against him that he does not show a probability at least of a personal advantage to himself by its being done. A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice *or to compel the defendants to buy their peace.* * * *"

IV.

Insofar as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional and seeks to take away an inherent and inalienable right.

The evidence in this case, while it shows that the railroad company and its officers preferred to deal with an organization with membership limited to its own employees, also shows with respect to attempts to influence employees to join the Association that attempts in this direction were made by only three officers and agents: (*a*) by the Assistant Agent at Houston, who spoke to 92 employes—unsuccessfully as to 84, successfully to 8; (*b*) by the Agent at Dallas, who spoke to two employees, unsuccessfully in both cases, and (*c*) by an Assistant Superintendent on the Houston Division, who spoke to one employee unsuccessfully. A statement of the evidence on the methods used to gain members for the Association is found in Section I, above.

The decisions of the court below are based on the assumption that Congress not only has made it unlawful for employer or employee to influence or attempt to influence the other, but that Congress has power to do so. While denying that Congress intended such provision of the Act of 1926 to be compulsory, it is submitted that Congress has no such power.

In 1898 Congress attempted to make it an offense, among other things, to discharge, threaten to discharge or discriminate against an employee because of member-

ship in a labor organization. One Adair was indicted and convicted for discharging an employee for membership in a labor organization. On appeal the Supreme Court held the Act void. *Adair* v. *United States,* 208 U. S. 161. The court said that:

> "It is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. *It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted,* and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him."

It is plain from the language quoted that under this holding, Waid, Torian and Lull had an inherent constitutional right even *to make membership in the Association a condition to the continuation of employment.* Certainly this includes the lesser right to peaceably, without threats, influence employees to join the Association, and to recognize the Association as the only organization through which they would confer and negotiate with their employees. It is plain from the language above cited that the defendants had the constitutional right to refuse to confer or negotiate with employees at all, which includes the right to confer and negotiate only in a particular manner. The effect of the injunction as interpreted by the court is to give

to one organization a monopoly of representation before the employer, an effect never intended by Congress, and beyond its constitutional power.

A State statute similar to that involved in the *Adair* case was held unconstitutional in *Coppage* v. *Kansas*, 236 U. S. 1, and other statutes attempting in a similar way to abridge the employer's freedom of contract have been uniformly held unconstitutional by the State Courts.* In the *Coppage* case the court's words are particularly applicable to the case at bar:

> "But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employee because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employee an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied? Can the legislature in effect require either party at the

*Gillespie v. *People* (Illinois 1900), 58 N. E. 1007; *State* v. *Julow* (Missouri 1895), 31 S. W. 781; *State* v. *Goodwill* (W. Va. 1899), 10 S. E. 285; *Coffeyville Vitrified Brick Co.* v. *Perry* (Kansas 1904), 76 Pacific 848; *People* v. *Marcus* (New York 1906), 77 N. E. 1073; *State* v. *Daniels* (Minnesota 1912), 136 N. W. 584; *People* v. *Western Union Telegraph Co.* (Colorado 1921), 198 Pacific 146; *State* v. *Kreutzberg* (Wisconsin 1902), 90 N. W. 1098; *Railway* v. *Schaffer* (Ohio 1902), 62 N. E. 1036; *Montgomery* v. *Pacific Electric R'y Co.* (C. C. A. 9th Circuit, 1923), 293 Fed. 680; *Owen* v. *Westwood Lbr. Co.* (Oregon 1927), 22 Fed. 2nd 992.

beginning to act covertly, concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? Supposing an employer is unwilling to have in his employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? And is not the employer entitled to insist upon equal frankness in return? Approaching the matter from a somewhat different standpoint, is the employee's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

"These queries answer themselves. The answers, as we think, lead to a single conclusion. Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua*

non of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from Adair *v.* United States."

The same question was recently passed on by the Supreme Court when it denied a writ of certiorari (264 U. S. 586) in the case of *Montgomery* v. *Railway,* 293 Fed. 680. Last year, also, a Federal Court held unconstitutional a statute making it unlawful for employers to prescribe the stores at which employees might buy their supplies. *Owen* v. *Westwood Lbr. Company,* 22 Fed. (2d) 992.

The injunctive order likewise infringed the right of the company not to have its property taken without due process of law, since it is clearly established that freedom of contract is a property right within the constitutional inhibition.

Smith v. *Texas,* 233 U. S. 630, 636.
Adair v. *United States,* 208 U. S. 161, 172.

In the *Coppage* case it was suggested that *coercion* of employers toward employees and *vice versa* might constitutionally be forbidden, but held that discharging an employee for membership in a labor union was not "coercion" in the legal sense, it being said that—

> *"Nor can a State, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard."*

V.

Section 52, Title 29, of the Judicial Code, which was Section 20 of the Clayton Act, prohibits the granting of an injunction in this case.

The essential portions of the article above cited are:

> "No restraining order or injunction shall be granted by any court of the United States or a judge thereof in any case between an employer and employe * * * growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, and such property or property right must be described with particularity in the application. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment * * * from recommending, advising or persuading by peaceful means to do so * * * or from peacefully persuading any person to work or abstain from working." (U. S. Code, p. 950, Sec. 52.)

This Court has construed this act as being only declaratory of the law as it stood before. *Duplex Printing Press Company* v. *Deering,* 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184.

To meet the requirements of this statute, counsel who drew plaintiff's bill made the following allegations of "property" rights threatened with "irreparable" injury:

(1) That complainants will be deprived of important property rights by way of loss of increased wages, and by

way of being denied the right to contract for their labor and services with the defendant, Texas & New Orleans Railroad, through collective bargaining and representatives of their own choice * * *.

(2) They will be deprived of work and conditions of work under arrangements as to representatives which will insure fair wages and working conditions. * * *

(3) That they will be forced to withdraw from membership in the Brotherhood, and it will be dissolved, and Harper and other members will lose their interest in certain valuable real estate and other property owned by the Brotherhood, and will lose the insurance protection afforded them by the death benefit fund of the Brotherhood * * * (R. 38-39.)

The "dispute" here involved is clearly within the class included in the statute. The word "dispute" in the act refers to "terms and conditions of employment, such things as hours of labor, wages, classification of employes, sanitary and physical conditions controllable by the employer, opportunity for reasonable redress of grievances and for bargaining respecting the conditions of employment, whether collective or individually." (*Vonnegut Machinery Co.* v. *Toledo Mach. & Tool Co.*, 263 Federal 192, 201.)

The first two allegations above referred to attempt to classify as "property rights" vague speculations as to "increased wages," "better working conditions," etc., *which might in the future* be granted, but which have no present existence, nor even any probable future existence. Whether or not "better wages" and "better working conditions" will

in the future be granted to these plaintiffs, or any of them, rests entirely within the control of the defendant. As well argue that "A" has a property right in "B's" money because "A" may, in the future, be able to get it away from "B" by threats, coercion, or other means.

The allegation as to the loss of the right to contract through collective bargaining is equally untenable. All that is shown by the evidence is that the Brotherhood, *bargaining collectively,* was unsuccessful in negotiating a new contract for the clerical employes, while the Association, *bargaining collectively,* was successful. The Brotherhood can still bargain all it pleases, but no one would assert that the Company is bound to contract. What plaintiffs allege is the absurd proposition that they have a "property right" in *being unsuccessful!*

The allegations in the third paragraph above that the complainants would lose their interest in valuable real estate and insurance benefits are not supported by any proof. No evidence was offered to show that the Brotherhood owned real estate, or how complainant's title or interest in it would be lost. Nor was there any evidence offered as to the insurance benefits of the Brotherhood. The witness Harper testified that group insurance was carried by the Company for its employes, but the insurance referred to in the bill is "insurance protection afforded by the death benefit fund of the Brotherhood." There is no proof of such insurance, or that the Brotherhood had such a fund. Neither is there proof that anything done or contemplated by the Company will force any member of the Brotherhood to withdraw.

The First Circuit Court of Appeals recently held that even a strike in *violation of a written contract* did not irreparably injure a property right within the meaning of the act here being discussed. Any resulting injury, said the court, would be *damnum absque injuria*. *Foss* v. *Portland Terminal Company*, 287 Federal 33. How then, can a property right be said to exist in the possibility of wage increases in the future, and the right to *make a contract* through representatives, etc., when such so-called "right" depends entirely upon the willingness of the other party to agree to it? No evidence was offered that the Company would make any future agreements whatever.

The court below has answered the contentions under this proposition by the broad assertion that:

> "It is just as much a property right of an employee to work in interstate commerce under a guarantee granted to him by Congress, that his wages and working conditions shall not be fixed for him without representation as it is for an employer to have the right to continue operations in interstate commerce protected from activities of persons who would seek to prevent that operation, by inducing persons not to work for them." (R. 401.)

It is plain from this quotation that the court simply enlarged the provisions of the Act of 1926 to the point where a plausible statement of a property right could be made. An analysis of the provisions of that act plainly shows that no such right as suggested by the court is conferred, even if the act be held to be mandatory.

The most that is conferred by paragraph three of Section Two is the right to be free from interference, etc., in

selecting representatives. This is a purely *personal* and not a property right—a *personal* right to be free from annoyance and interference. It has not been contended that the Company must obey or even hear the representatives, however chosen. Nothing in the act even purports to prevent the Company from fixing wages even *without consulting anyone at all!* It is apparent then that the statement of the court that "his wages and working conditions shall not be fixed for him without representation" goes far beyond anything contained in the Act. This is the only property right found by the court, and since without it no injunction could have been granted consistent with the statute here discussed, this phrase must be taken to be the basis of the power to grant the injunction. This basis clearly has no foundation in the statute, and the injunction resting upon it must fall.

VI.

The recognition of the Association was legally justified and was not a violation of the temporary injunction which the court had granted though it be conceded for the sake of argument that the preliminary injunction was lawfully granted.

What the defendants did and all they did after the injunction was entered was to recognize the Association as representative of the employes to enter into a wage agreement with the Association, and to cease to recognize the Brotherhood and to extend favors to its officers which had theretofore been extended solely because of their then

representative character. The Association had been organized prior to the time the bill was filed. Its permanent organization was perfected on July 11, 1927, at which time officials and representatives were chosen and the Constitution and By-Laws adopted. (R. 982-986.)

In the affidavit which was presented to the court at the hearing of the application for temporary injunction the court was fully advised that it was the purpose of the company and its officials to deal with the Association rather than the Brotherhood provided a majority of the employees requested the company to do so. In this affidavit petitioner Torian said:

> "The officers of the Association have tendered to affiant in his official capacity written authorizations claimed to be held by the Association of the majority of the said clerical employes, but affiant acting for Texas and New Orleans Railroad Company has declined to receive or act upon same until a certain pending request for changes in rates of pay made by the Brotherhood and recently the subject of mediation shall have been disposed of or dismissed by the United States Board of Mediation * * * When the said pending matter shall have been disposed of or dismissed by the Board of Mediation *it is the purpose of affiant to consider the said request and the said alleged authorizations of the Association and thereupon to treat with and consider as representative of the clerical employees of the Texas & New Orleans Railroad Company said organization, provided it shall have authority to act for and represent the majority of its clerical employees* * * * It has never been the purpose or intent of the Railroad Company to recognize or deal with the

Brotherhood except as required to do so by the decisions of the Railroad Labor Board which will be of no further force or effect in the event the Association should present to the railroad company evidence that it is authorized to represent a majority of the clerical employees." (R. 413-419).

These facts present the highest evidence of good faith of Torian and the other officials of the railway company. They did on August 6th what they told the court they would do, namely, check the letters of authorization of the Association which had already been prepared when the injunction was granted and recognize the Association. The court did not enjoin them from doing any of these things and certainly none of them amount to contempt of court.

VII.

The contempt order which the court entered broadens the injunction and in a purely retroactive way condemns and punishes for things that the injunction did not prohibit. In adjudicating the defendants guilty of contempt for the things denounced in the contempt order the court is extending, amplifying and enlarging the injunction and insofar as it does so the punishment denounced in the contempt order is ex post facto.

The acts complained of in the original bill which are made the basis of the temporary injunction, are above stated and are disclosed in the seventeen affidavits attached to the bill. (R. 47-65.)

These affidavits show that the clerks, McDaniel, Ehlinger and other promoters of the Association were cir-

culating letters and petitions and seeking to induce clerks to join the Association. Whatever influence was exerted by the officials of the railway company in favor of the Association and against the Brotherhood was merely the permission that this be done, together with the giving of the information that the company and its officials preferred to deal with the Association. This influence had been exerted. These signatures had been obtained. The Association had been organized when the injunction was granted. The injunction did not undertake to prevent the recognition of the Association and its recognition was not a violation of the *letter* of the injunction. Neither was it a violation of *spirit* of the injunction if the officials acted in good faith believing that the Association was truly representative of its clerical employes, as they clearly did believe.

The Act of 1926, paragraph 3, Section 2, which is the basis of this action, *does not require that representatives be selected by a majority of the employes.* If the officials of the company really believed that the Association represented the best element of its employes, that it stood for greater fidelity to the company's interest and advancement as well as that of the clerks, and so believing recognized the Association, its action would not be in violation of the injunction or the statute even though there may not have been a clear majority of all the employes in the Association.

The court did not even pretend that any influence, even the mildest, had been exerted on the clerks between the date of the injunction and that of the recognition of the Association, and the agreement with it, but only (in the face of the evidence) that most of the authorizations of the Asso-

ciation had been theretofore obtained "by the use of means in violation of the statute." (R. 256.)

If this court will compare these things that were done and made the basis of the contempt order with what it recognized as perfectly lawful and permissible in the *Adair* case, 208 U. S. 161, in the *Coppage* case, 236 U. S. 1, and the things which Justice Brandeis held permissible in the *Mitchell* case, 245 U. S. 229, it will at once become apparent that the lower court must have overruled the letter and spirit of these decisions in order to sustain the judgment that was entered.

VIII.

Retention of officers of the Brotherhood on seniority rosters while devoting their entire time to their organization, and granting them free passes and other gratuitous benefits were mere favors, revocable at the pleasure of the employer. Their revocation was in the exercise of constitutional rights of the employer and its officers, and the order of the District Court requiring their continuance deprived petitioners of their property without due process of law, and of the equal protection of the laws. The Court had no power to restore a status resting on no legal right.

The facts with respect to Harper, General Chairman, and Walker, General Secretary-Treasurer of the Brotherhood, are as follows:

Harper had been employed by Southern Pacific Company, Pacific System, at Tucson, Arizona, as a brakeman,

and had been discharged for drinking intoxicants. (R. 1085-6.) On the false representation, verified by his affidavit, that the reason for leaving his last employment was that he had resigned, he was employed as a clerk by the Railroad Company (photostat of personal record of Harper between pages 1086 and 1087 of Record). He was appointed or elected about June 9, 1923, General Chairman of the Brotherhood and was granted an indefinite leave of absence effiective June 15, 1923. From this date forward he rendered no service to the Railroad Company and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time. (R. 812; 848.)

Walker had been employed by The San Antonio & Arkansas Pass Railway Company, had been appointed or elected an officer of the Brotherhood, and was on leave of absence from the service of his nominal employer when, on May 1, 1925, its properties were leased to the defendant, Texas and New Orleans Railroad Company. (R. 801-2.) On August 30th, 1925, he requested of said last named Company an indefinite leave of absence which was granted. (R. 502.) He rendered no service to the Railroad Company, and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time —except that he was recalled from leave and rendered service to the Company from February 7, to March 4, 1927. (R. 885.)

During their leaves of absence the names of both Harper and Walker were carried on the seniority rosters of the Company, it being thereby indicated that in the event of

their return to the service, their seniority would be deemed to date from the time of their original employment. (R. 814-5.)

They were allowed the benefit of the Company's group insurance, the Company paying the premiums on the first five hundred dollars, and the employee, at a very low rate, on the remainder. (R. 813, 876.)

They were permitted by the Hospital Association of the Southern Pacific Lines, which is controlled jointly by the employees and the Company, to share in its benefits, at the rate of one dollar per month, like employees regularly in the service. (R. 813, 877-9.)

Free annual passes were furnished Harper, good over all lines of the Company; similar passes were furnished Walker over the lines of the Houston Division and free trip passes elsewhere. Dependent members of the families of both were, on reasonable request, usually furnished free passes. (R. 814, 890-902.)

Following the recognition of the Association, and consequent non-recognition of the Brotherhood, these men were dropped from the rosters and their privileges as nominal employees terminated. (R. 139-140, 803-804.)

These men were at most only nominally employees, at the pleasure of the employer. Harper, having entered the service, and having remained nominally in it, through deception could not complain of the termination of the relationship under any circumstances. (*Minneapolis, etc. R. Co.* v. *Rock*, 279 U. S. 410, 412.)

But assuming that their status was no different from that of any working clerk, the injunction, as interpreted

by the court violates not only the Constitution but the Clayton Act as well. It will be noted from a reference to the portion of that Act quoted herein that "no such restraining order shall prohibit any person or persons whether singly or in concert, from terminating any relation of employment * * * ." Section 53 of Title 29 provides that:

> "the words 'person' or 'persons' wherever used in Section 52 of this Title shall be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (C. 323, Sec. 1, 38 Stat. L. 730.)

This Court in *Adair* v. *United States,* 208 U. S. 161, has said:

> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another." (P. 174.)

It said in the *Coppage* case that the act of discharging an employee for refusal to sever his connections with a labor union was *"entirely devoid of any element of co-*

ercion, compulsion, duress, or undue influence." (263 U. S. 15.)

This Court seems still to regard the *Adair* case as law.

Adkins v. *Childrens Hospital*, 261 U. S. 525, 545.

Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 251.

Montgomery v. *Railway*, 293 F. 680, Cert. den. 264 U. S. 586.

IX.

Discharge of employees, for causes wholly disconnected with the labor dispute, and necessary, in the opinion of supervising officers of the Railroad, to the maintenance of discipline was not and could not be a violation of the injunction against interference, influence and coercion in their right of organization and selection of representatives. The Railroad has the right to discharge employees for any cause, or (though it does not exercise it) for no cause. The order of the District Court, requiring the restoration of the discharged men to the service with pay for time lost deprived petitioners of their property without due process of law and deprived them of the equal protection of the laws.

Among other employes discharged from the service of the Railroad were three clerks, members or claiming to be, of the Brotherhood: one of them, Charles Ginsberg, about October 4, 1927, for insubordination, in absenting himself from duty contrary to instructions (R. 498-9, 551-7);

another, B. G. Hudson, about October 27, 1927, for fraud in obtaining free passes by means of a false statement (R. 159-160, 560-576, 1036); and the third, R. E. Stotzer, about October 30, 1927, for negligence in waybilling two car loads of perishable freight to the wrong destinations. (R. 491-4, 564-8, 637.) Each admitted the commission of the offence, but it was claimed that the *motive* of the punishment or its severity, was their connection with the Brotherhood.

Hudson and Stotzer had made affidavits which were used by the Brotherhood on the hearing of the application for the temporary injunction, but Ginsberg first appeared in the case, and in the Brotherhood after his discharge.

It is believed that the authorities referred to under the preceding point sufficiently cover this.

X.

The injunctions, temporary and perpetual, are framed in such general language, and so interpreted and enforced by the District Court, that they keep petitioners in constant jeopardy of contempt, with no basis for determining what action in the management and operation of the railroad may be a violation of the injunction.

Petitioner railroad is a highway of interstate commerce extending through the States of Texas and Louisiana. Its officers are charged by law with the duty of honest, efficient and economical management (Interstate Commerce Act, Sec. 15a) and with responsibility for the safety of per-

sons and property transported by them. In the discharge of their duties they must preserve and enforce discipline—must perform their duty of management. The district court has, by its injunction and its interpretation, set pitfalls for them.

New Haven R. R. v. *Interstate Commerce Commission*, 200 U. S. 361, 404.

Swift & Co. v. *United States*, 196 U. S. 375, 400-401.

It is respectfully submitted that the petition should be granted.

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